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Supreme Court of the United States

OCTOBER TERM, 1946

No. 167

OLAF JORGENSEN,

Petitioner,

against

YORK ICE MACHINERY CORPORATION,

Respondent.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1946

No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Olaf Jorgensen, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which unanimously affirmed a judgment of the United States District Court, Eastern District of New York, in favor of the above-named defendant-respondent, entered upon a verdict, after a trial before Inch, D. J., and a jury; and which also affirmed an order denying the plaintiff's motion to set aside the verdict.

Opinions Below

The opinion of Judge Inch denying plaintiff's motion to set aside the verdict and for a new trial appears on pages 589 to 592, inclusive, of the Transcript of Record.

The opinion of the Circuit Court of Appeals, which was written for affirmance by Judge Learned Hand, is printed on pages 600 to 607 of the Record.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C. A., Section 347 (a).

The decision of the Circuit Court of Appeals was rendered on April 2, 1947. The time to apply for this Writ expires on July 2, 1947.

Statement

In an action to recover damages for personal injuries alleged to have been the result of defendant's negligence, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of the United States District Court, Eastern District of New York, dismissing the complaint, entered upon the verdict after a trial before Inch, D. J.; and affirmed an order denying plaintiff's motion to set aside the verdict and for a new trial.

The facts, which give rise to the questions herein sought to be reviewed by certiorari, are set forth as directly and concisely as possible in the annexed brief. In the interests of brevity, they are not repeated herein

Questions Involved and Reasons for Granting the Writ

The questions involved (which are more fully presented and considered in the annexed brief) are the following:

(1) In an action to recover damages for personal injuries alleged to have been due to defendant's negligence,

is the plaintiff entitled to have the jury instructed that a witness who is in the defendant's employ and whose negligence is alleged to have caused the plaintiff's injuries, is an interested witness?

It has frequently been so held in the appellate courts of the State of New York; but the question does not seem to have been determined by this Court. It is respectfully submitted that it is a question of law of such general interest and importance that it should be reviewed by this Court.

(2) In such an action does the fact that defendant's counsel, in the course of his summation, stated to the jury that plaintiff, if defeated, "would have a claim against other parties and not against the defendant" (whereby there was conveyed to the jury the impression that plaintiff would, in any event, have his remedy by way of workmen's compensation), constitute reversible error as a matter of law?

The question has been before the appellate courts of the State of New York, and it has been uniformly held (in the cases cited in the annexed brief) that such an allusion by counsel for defendant in a negligence action to the fact that plaintiff, though defeated, would still have his remedy by way of workmen's compensation, constitutes too serious an error to be overlooked and requires the reversal of a judgment for defendant.

The question is one which is of sufficient moment to warrants its review by this Court upon certiorari.

(3) Does the fact that, by reason of the conduct of the jury, the verdict was improperly and irregularly arrived at (in the manner more fully shown under Point III of the annexed brief) so that it does not express or represent the true opinion and judgment of the jurors, justify or require that the verdict be set aside and a new trial granted?

This Court has heretofore granted a writ of certiorari to inquire into the action and conduct of jurors whereby they arrived at their verdict. *McDonald* v. *Pless*, 238 U. S. 264 (though in that case, after argument upon the return of the writ of certiorari, it was held that the fact that the jurors, after they had agreed upon a verdict, fixed the amount thereof by a *quotient* method was not sufficient to justify setting aside the verdict upon jurors' affidavits).

In the instant case the alleged impropriety, whereby the verdict was arrived at, is fundamental, in that it goes to the very fact of the *agreement* upon a verdict itself—not merely the method of fixing the amount.

The question whether, under such circumstances plaintiff has had a fair trial, and whether the verdict should not be set aside, and a new trial had, in the interests of justice, is one which it is respectfully submitted, should be reviewed by this Court on certiorari.

WHEREFORE, your petitioner respectfully requests the issuance of a Writ of Certiorari.

Dated, June 20, 1947.

Respectfully submitted,

LOUIS PHILLIPS,
Counsel for the Petitioner,
1501 Broadway,
New York City, New York.

Supreme Court of the United States

OCTOBER TERM, 1946

No. _____

OLAF JORGENSEN,

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against

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Respondent.

PETITIONER'S BRIEF

Statement

The petitioner makes this application for a Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a judgment entered upon a verdict for defendant after a trial before Hon. Robert A. Inch, D. J., and a jury, dismissing the complaint herein; and also affirmed an order denying plaintiff's motion to set aside the verdict.

The action is brought by plaintiff to recover damages for personal injuries alleged to have been the result of defendant's negligence.

The Facts

Petitioner (who was the plaintiff in the Courts below) was a plumber and steamfitter and sustained serious injuries on October 2, 1941, when he was in the employ of

the Jakobson Shipyard, at Oyster Bay, New York, and was at work upon a vessel known as the "Rodman Butler".

The respondent (defendant below) was engaged in installing an ice box and ice machine in the forward hold (two decks below the main deck) of the vessel.

The ice machine and its equipment were being installed by defendant under the direction and supervision of defendant's supervisor of installation, Arthur Trinka; and plaintiff had been assigned by his machine shop boss to help Trinka.

Plaintiff's work consisted of cutting pipes, cleaning joints and "sweating" (or soldering) joints under Trinka's direction.

The pipes were intended to contain a refrigerating element or gas known as "freon".

Freon, if it comes in contact with an open flame, decomposes into toxic gases which are highly poisonous, namely, hydrochloric acid gas, hydrofluoric, phosgene, chlorine and minor products. When freon is in contact with an open flame, the flame turns green and the freon decomposes.

Plaintiff had no knowledge of the characteristics of freon, or under what circumstances it would be dangerous or harmful; and he was not warned by defendant prior to the accident of the dangerous qualities of freon when in contact with a flame.

The work was being done in a small room (referred to as the engine room in which the refrigerating machinery was being installed) which had no windows, no cross-ventilation, and but one door.

Plaintiff was working, under Trinka's direction, with a lighted blow torch.

There is no dispute that before freon is injected into a piping system the pipes should be subjected to certain preliminary tests for leaks.

The evidence on behalf of the plaintiff was that Trinka injected freon into the pipes without making the usual and customary tests; that there was a leak through which freon escaped; that the escaping freon was in contact with the open flame of the gasoline blow torch carried by plaintiff; that the flame turned green; that immediately plaintiff began to choke, gasp and cough, so that he was forced to make his way precipitately to the open air on the main deck, where he collapsed and fell to the deck. Plaintiff's testimony as to these matters was substantiated in all important respects by that of his helper, Moore.

Trinka's testimony, on the contrary, was that plaintiff was not in the engine room at the time Trinka let the freon into the pipes; and that plaintiff did not at the time have a gasoline blow torch. His testimony upon his examination before trial and upon the trial contradicted itself in many important respects.

The evidence of both parties was very fully analyzed in plaintiff's brief in the Court below; and it would extend this brief to inordinate length if the analysis of the evidence were to be repeated here.

Suffice it to say that Judge Hand was under a complete misconception where he said in the opinion that plaintiff raised, as his first objection to the judgment, that "there was *no evidence* to support the verdict."

Plaintiff did not raise any such objection. The objection which plaintiff raised in his brief in the Court below was, not that there was no evidence to support the verdict, but that the verdict was plainly against the *weight of the evidence.*

Though the plaintiff recognized that the Circuit Court of Appeals will not ordinarily reverse a judgment on the ground that the verdict is against the weight of the evidence; yet it was plaintiff's contention that in this case (as

stated in the brief below) "the verdict is so plainly against the weight of the evidence that the conclusion is inescapable that it must have been arrived at because of the errors of law (hereinafter referred to) occurring during the course of the trial, which operated greatly to the prejudice of the plaintiff with the jury; and because of the substantial irregularity and impropriety in procedure whereby the jury arrived at its verdict—which should have resulted in the granting of the plaintiff's motion to set aside the verdict and for a new trial."

It is respectfully submitted, therefore, that Judge Hand was in error when he said in his opinion that plaintiff was in no position to raise the question "for he never asked the judge to take any of the issues from the jury; and it is universally ruled that one [who] does not ask for such a direction but consents to go to the jury, may not later challenge the verdict for insufficiency." The statement of the learned Judge would be pertinent if plaintiff were contending on the appeal (as the Judge mistakenly assumed) that there was *no evidence* to support the verdict. The principle cited has no application where, as here, plaintiff's contention is that the verdict was so far against the weight of the evidence that it must have been influenced and induced by the errors of law hereinafter referred to; and that the Circuit Court of Appeals, in view of all the circumstances, should have exercised its undoubted power to reverse the judgment and grant a new trial in the interests of justice.

The questions of law (set forth below) upon which plaintiff claims the rulings of the District Judge were erroneous, are questions of general interest which appear not to have been passed upon by this Court; and it is respectfully submitted that they are questions of sufficient importance and public interest to warrant a review of the judgment rendered by the Court below.

POINTS

I.

It was reversible error for the court below to refuse to charge the plaintiff's request that Trinka was an interested witness; and such error presents a question which should be reviewed by this Court.

At the conclusion of the charge the Trial Court asked if there were any requests, and inasmuch as the Court had stated to the jury that the plaintiff was as a matter of law an interested witness (f. 1590),* counsel for plaintiff requested the Court to charge the jury that Trinka was also an interested witness. The request, and the Court's disposition thereof, were as follows:

> "May I ask the Court to say to the jury that the witness Trinka is an interested witness.
>
> The Court: I think that the amount of interest of Trinka—
>
> Mr. Barry: Is to be weighed by the jury.
>
> The Court: Is to be weighed by the jury. He is a little different from the plaintiff. And by the statement that the plaintiff is an interested witness I do not mean that you must feel that that interest affects his testimony one way or the other—simply that he is seeking to recover some money. That is all.
>
> Mr. Rothbard: May I respectfully except to the Court's refusal to charge as requested and to the modification?
>
> The Court: Yes" (ff. 1608-1609).

It thus appears that in ruling upon the request the Court adopted word for word the suggestion interposed by defendant's counsel; *it was not a correct statement of*

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* Folio references are to folios in the Transcript of Record.

the law or of the ruling to which, upon his request, the plaintiff was entitled. Plaintiff excepted to the refusal to charge and to the modification; and such refusal, it is respectfully submitted, constituted reversible error and entitled plaintiff to a new trial.

Trinka was defendant's sole witness (other than its one expert); sharp issues of fact were presented by the testimony of plaintiff (omitting for the moment that of plaintiff's helper Moore, who happened to be an ordained minister) on the one side, and Trinka on the other. In that situation, for the Trial Court to leave the jury with the impression that plaintiff was an interested witness and that Trinka was not an interested witness (as that expression is used in the law), was not only erroneous, but was highly prejudicial to the plaintiff's case.

Trinka was definitely an interested witness as a matter of law. If there was negligence which resulted in the injuries to plaintiff, *the negligence was that of Trinka.* His position is analogous to that of the operator of a vehicle charged with the negligent injury or death of another—he is bound, if possible, to absolve himself from the charge of carelessness resulting in such serious consequences—his continuance in his job might depend upon his success in this respect, or, if he were unsuccessful, there might be a possible recovery over in money damages against himself. In such a situation, the courts have uniformly held that the one accused of fault is *an interested witness.* Where a person to whose fault or negligence an injury suffered is imputed seeks *to exonerate himself* by his own testimony, he is an interested witness.

Anderson v. *B. & O. Ry. Co.*, 96 F. (2d) 796, 798 (C. C. A. N. Y.);

Gaffney v. *N. Y. Consolidated Ry. Co.*, 220 N. Y. 34, 37;

Volkmar v. *Manhattan Ry. Co.*, 134 N. Y. 418, 422;

Hoes v. *Third Ave. R. R. Co.*, 5 App. Div. 151, 154.

In *Anderson* v. *Baltimore & Ohio R. Co., supra,* where defendant's explanation of the accident which caused the death of plaintiff's intestate turned upon the truthfulness of its engineer Cobb, whose alleged negligence was claimed by plaintiff to have caused the accident, it was said, in affirming a judgment for plaintiff:

> "The sufficiency of the defendant's explanation of the failure of the sanders depends upon the truthfulness of Cobb's testimony concerning the test he made before the train started, the sufficiency of the air pressure when he opened the valve at Stanley, and what he did to get the apparatus to function properly after the train stalled. He was an *interested witness* and what measure of credence should be given to his testimony was a jury question." (Italics added.)

In *Gaffney* v. *N. Y. Consolidated R. R. Co., supra,* where a judgment for defendant was reversed and a new trial granted, it was said:

> "If intestate's death was caused by negligence, the motorman was the person who was guilty of that negligence. He was of course deeply interested as a matter of common humanity in proving that responsibility for the death of a fellow-employee did not lie at his door, and it was for the jury to say whether testimony which he gave under such inducement and for such purpose should be accepted as truthful or rejected."

In the case of *Hoes* v. *Third Ave. R. R. Co.,* 5 App. Div. 151, 154, an action wherein the plaintiff sought to recover damages for personal injuries claiming that the mishap was caused through the neglect of the defendant's street car conductor in starting the car before the plaintiff had had a reasonable opportunity to alight in safety, the Appellate Division said (with respect to the Trial Court's

charge to the jury):

> "When he came to call their attention to the testimony of the conductor he told the jury that he might be considered a witness interested '*just as the plaintiff is interested,* because the conductor, although not sued here for damages, is still charged with being the proximate or immediate cause of the damage for which his employer was sued. The conductor may be regarded as an interested witness.' We can see no error in this charge. *The conductor was an interested witness;* not because he had any pecuniary interest in the result of the action, but because he took part in the transaction and was undoubtedly charged with negligence in bringing about the injury to the plaintiff. *That made him an interested witness* and rendered the weight to be given to his testimony fairly a question for the jury." (Italics added.)

In the instant case Trinka's position is analogous to that of the conductor in the case last cited—he is "charged with being the proximate or immediate cause of the damage for which his employer was sued"—he is "*interested, just as the plaintiff is interested.*"

The Court's refusal to charge the plaintiff's request, and its modification thereof by adopting the language proposed by defendant's counsel (which was not at all the charge to which plaintiff was entitled) constituted reversible error; and required the granting of a new trial.

II.

The statement made by defendant's counsel, in the course of his summation, of the extraneous, prejudicial matter referred to below constituted reversible error; and presents a question of law which should be reviewed by this Court.

Counsel for defendant, in his summation, stated to the jury that plaintiff, if defeated, "*would have a claim against other parties* and not against the defendant."

When plaintiff's counsel strongly objected to the statement and asked the Court to instruct the jury to disregard it, defendant's counsel stated "that is what I said", and he added that the only claim against defendant must be one based on negligence. The Court instructed the jury to disregard the statement about any other party, but indicated that in other respects defendant's position was correct (ff. 1582-1583).

The statement that plaintiff, though defeated, would have a claim against other parties plainly conveyed the impression (and it was apparently so intended) that plaintiff would still have a remedy against his employer by way of workmen's compensation. The gross impropriety of this statement was not cured by the Court's admonition to disregard the statement. It operated to prevent plaintiff from having a fair trial; and by reason thereof a new trial should be had. No exception was noted; but, as said by the Court below, an exception is no longer necessary.

The mere mention that there was or might be available to plaintiff another remedy by way of compensation was harmful and ground for a new trial.

The question has come up before appellate courts in the State of New York on several occasions; and it has been uniformly held that the injection by statement of defend-

ant's counsel to the jury of an extraneous, prejudicial fact such as here in question, constitutes such error as to require the setting aside of the verdict and the granting of a new trial.

In the case of *Regan* v. *Frontier Elevator & Mill Co.*, 211 App. Div. 164, 165, the Appellate Division reversed a judgment and granted a new trial when such a statement was made by defendant's counsel, even though no exception was taken thereto. The Court said:

> "It was essential under such circumstances that the questions of credibility as well as of negligence and contributory negligence should be considered by a jury with minds free from irrelevant, prejudicial matter. * * *
>
> It is true that on neither occasion was a ruling made to which an exception was taken. No question of law is presented by the record in this respect. But the very asking of an improper question for an ulterior purpose or the statement to the jury of extraneous prejudicial fact or argument may constitute such error of fact as to justify the trial court or Appellate Division in setting aside the verdict in the interests of justice. (*Cosselmon* v. *Dunfee*, 172 N. Y. 507; *Cattano* v. *Metropolitan Street R. Co.*, 173 id. 565.) Such insistence by defendant's counsel on the plaintiff's right under the Workmen's Compensation Law as occurred in this case might well influence the jury toward the erroneous view that the plaintiff's loss should find compensation in part at least from his employer under the provisions of that statute. (*Posnick* v. *Crystal*, 181 App. Div. 66.) The situation is analogous to that which arises when reference is made on behalf of plaintiff to defendant's protection by insurance. The courts have long and consistently condemned such practice in vigorous terms."

In *Kimber* v. *Kress*, 225 App. Div. 16, 18, it was said (of the introduction of such extraneous matter by defendant's counsel): "But the liability of the plaintiff's employer or its insurance carrier for a compensation award under the Workmen's Compensation Law was wholly immaterial. We deem this extraneous matter highly prejudicial." To the same effect, *Moran* v. *Rainbow Appliance Corp.*, 225 App. Div. 587, 589.

In *Posnick* v. *Crystal*, 181 App. Div. 660, 661, the Court said:

> "On the whole, the merits so preponderated in favor of the plaintiff that the error in the admission of evidence about to be referred to can but be regarded as prejudicial.
>
> The respondent, over plaintiff's objection, insisted on introducing evidence that plaintiff's employer Schwartz was insured under the Workmen's Compensation Law. * * * The only possible purpose of introducing this evidence under the circumstances was to achieve the natural result of leading the jury to suspect or infer that plaintiff had been or could be compensated by merely making application under the Workmen's Compensation Law and, therefore, his case should not be seriously regarded. *This was distinctly harmful and may well have accounted for the verdict.*" (Italics added.)

In the instant case, as in the case last cited, it may be said that "the merits so preponderated in favor of the plaintiff" that the statement of defendant's counsel above referred to cannot be regarded otherwise than prejudicial; it requires that the verdict should be set aside and a new trial had in the interests of justice.

The question of the propriety of such an allusion in a personal injury action to "a claim against other parties" (which was plainly a reference to the remedy of Work-

men's Compensation) and its effect upon plaintiff's right to a new trial (though frequently before the appellate courts of the State) would appear not to have been passed upon by this Court; and it is a question of such general interest and importance that it should be reviewed by this Court.

III.

The verdict of the jury was so far affected by extraneous facts and circumstances entering into their deliberations that it did not represent the unanimous determination of the twelve jurors but was the result of a compromise irregularly and improperly arrived at; and for that reason the plaintiff's motion to set aside the verdict should have been granted.

Although the granting or refusal of a new trial is held, in the Federal Courts, to be a matter resting in the sound discretion of the trial judge, and his action thereon will not ordinarily be reviewed upon appeal, yet there may exist in a particular case special circumstances which make it necessary that his determination of the motion should be reviewed. *Southern Pacific Co.* v. *Klinge*, 65 F. (2d) 85, where the Court reviewed the action of the trial judge in denying a motion for a new trial, and held that outside matters introduced into the deliberations of the jury required the reversal of the judgment and the granting of a new trial.

Upon an appeal from the judgment the propriety of the action of the trial judge in denying the motion for a new trial may be considered by the appellate court in determining whether a new trial should be granted in the interests of justice.

It is respectfully submitted that in the instant case such special circumstances exist, which are set forth in the moving affidavits upon the application for a new trial,

as require the review of the action of the trial judge thereon; and the granting of a new trial.

It appears from the said affidavits that on the morning of the last day of the trial and before the summation, word reached one James A. Murphy, the foreman of the jury, that there had been received at his home that very morning a telegram from Washington advising him of the death of his son (a lieutenant in the Navy) in action in the Pacific. Following the receipt of that information, Mr. Murphy endeavored, by application to the Clerk of the Court, to have a postponement of the trial for one day, so that he could rejoin his family in their hour of grief; but he was told by the Clerk that it could not be done (f. 1735). Counsel did not then learn of this occurrence; the summation proceeded; the Court charged the jury; and the jury went out to deliberate upon its verdict.

From the said affidavits it appears that the jury upon retiring were aligned seven in favor of the defendant and five for the plaintiff; and that at no time prior to their returning to the court room and announcing their verdict was this vote changed (ff. 1750, 1756). In Mr. Murphy's affidavit it is said:

> "It goes without saying that I was greatly distracted at the tragic news. My son was approximately twenty-two years of age and a Harvard graduate.
>
> It was in this frame of mind that the jury started its discussions. It was seven for the defendant and five for the plaintiff and this alignment of seven to five continued throughout the discussion. It never changed. Someone suggested that we return to court and announce our inability to agree and someone else suggested that would get us nowhere because the Court would probably direct us to deliberate further. So we continued to discuss the case. The seven re-

mained for the defendant and the five for the plaintiff. When again it was remarked 'that so long as there was a majority for the defendant, let's render the verdict for the defendant'. This, I regret to say, was done, and we returned to the court and announced the verdict as one for the defendant. At no time after the suggestion was made that because there was a majority for the defendant we should return to court and announce our verdict as being for the defendant was there any additional vote taken except we all agreed to vote for the defendant immediately thereafter.

I am frank to say to the Court that I do feel that an injustice was done to the plaintiff; that I was terribly upset mentally by the sad news I had received that day; that I felt my presence was needed at home; and that the verdict was clearly a compromise verdict and not one rendered in accordance with the conscience of the five jurors who favored the plaintiff. In this connection I speak for myself. I still feel that the plaintiff was and is entitled to a verdict against the defendant on the merits and I stand ready, if it is desired, to appear before the Court and openly state the foregoing facts'' (ff. 1756-1758).

The affidavit of Marvin Swickle, a member of the jury, is to the same effect (ff. 1750-1752).

Under these circumstances the verdict of the jury did not represent the views of the individual members; it was a compromise arrived at as a result of the unusual situation—the verdict as announced did not represent the conscientious vote of each individual juror, which, it is respectfully submitted, the law requires, and to which the plaintiff was justly entitled.

The instant case is quite different from those of a *quotient* verdict (cited in the opinion below), for in such

cases the members of the jury had freely arrived at a unanimous determination in favor of the plaintiff, and the question of the quotient verdict had only to do with fixing the amount.

It is quite apparent that the foreman of the jury herein, grief-stricken as he was, did not and could not have his mind on the case. He could not be expected to argue the merits of what had become to him a relatively unimportant matter; and it is evident that he readily acquiesced in the suggested procedure whereby the deliberations of the jury were cut short by the return of *a verdict arrived at by a majority vote.*

The case presents a most serious situation for plaintiff. The plaintiff, not yet 50 years of age at the time of the trial, sustained injuries which permanently bar him from further work at the only occupation for which he is fitted. He has lost fifty per cent of the use of his arm; he has a permanent lung infection; and in the opinion of at least three doctors he can no longer work as a plumber and steamfitter.

It was said by the District Judge, in opposition to the motion for a new trial, that a juror may not, by affidavit, impeach the verdict. The general rule in this respect, however, is not inflexible. In *McDonald* v. *Pless,* 238 U. S. 264, 268 (a case in which this Court had granted certiorari where it was alleged that the verdict had resulted from misconduct or impropriety on the part of the jury), it was said that the decisions "recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice;' " though in the *McDonald* case (where there was a quotient verdict) it was held there was nothing of an exceptional character warranting a departure from the general rule.

In the case of *City of Amarillo* v. *Emery,* 69 F. 2d 627, the Court said:

"It is the general rule in federal courts that the allowance or refusal of a new trial rests in the sound discretion of the trial court and error cannot be assigned thereto. It is also the general rule that a juror will not be permitted to impeach his verdict. However, there are exceptions to both rules. While a juror may not testify to a matter resting in his personal consciousness, affidavits of jurors, which show overt acts constituting misconduct or that *extraneous matters that might influence the jurors have been brought to their* attention, are admissible. *Mattox* v. *U. S.*, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917." (Italics added.)

In the instant case it is respectfully submitted that the extraneous matters introduced into the deliberations of the jury, resulting in a verdict which represented the views of a bare majority of the jurors, were of such an exceptional character (within the principle announced in the cases cited) as to require the granting of the motion to set aside the verdict and for a new trial in the interests of substantial justice.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

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Supreme Court of the United States

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD ASH,
DESMOND T. BARRY,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a petition by plaintiff, Olaf Jorgensen, for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which unanimously affirmed (with opinion written by Hon. Learned Hand, 160 Fed. (2nd) 432) a judgment of the United States District Court, Eastern District of New York, in favor of defendant-respondent, which was entered on a verdict in said respondent's favor, after a trial before Inch., D. J., and a jury. An order of the aforesaid Circuit Court of Appeals, which affirmed an order of the Trial Court denying plaintiff's motion to set aside the verdict, is also sought to be reviewed.

The Facts

Jorgensen, the plaintiff, who is the petitioner here, claimed that he was injured in the engine room of a United

States transport known as the "Rodman Butler" (ff. 214, 215).* An ice box and ice machine were being installed on that ship under the supervision and direction of the defendant, and plaintiff, a plumber employee of another contractor, was assisting in the work (ff. 46, 47). The ice box and machine were being installed by defendant's supervisor, Arthur Trinka (f. 47).

The ice box itself was being installed in the refrigerator room (f. 207); the ice machine was being installed in the engine room (ff. 172-173, 208). Both rooms are separate although adjacent to each other (Defendant's Exhibits G and H, f. 177).

It was plaintiff's contention that while he was in this engine room with Trinka, the latter let "freon" gas into the newly installed refrigerating system without first making proper tests to determine whether there were any leaks in the pipes which defendant installed; that the "freon" gas came in contact with the flame of plaintiff's open blow torch and broke down into its dangerous and injurious constituent gases, causing injury to plaintiff.

The defendant showed that firstly, it did not sweat these pipe joints which allegedly leaked. Plaintiff and his fellow employees of the Jakobsen ship yards had done this (ff. 48, 1690).

Secondly, defendant introduced plaintiff's signed statements into evidence to show that plaintiff had asserted that the accident happened in the ice box where he was testing for leaks (ff. 1710, 1714). Yet on the trial he asserted the accident happened in the engine room—a different room entirely.

In his deposition before trial, plaintiff admitted that he was testing for leaks (ff. 230, 238). On the trial, he denied this; he was only watching Trinka let the "freon" gas into the pipe system (ff. 224, 226, 248-249). The hospital record also shows that Jorgensen was testing for leaks.

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* References are to folio numbers in transcript of record, unless otherwise noted.

Trinka, defendant's supervisor, unequivocally stated that the plaintiff was not even in the engine room while he was testing for leaks (f. 1260). Plaintiff had gone into the refrigeration or ice box room to test for leaks there (ff. 1247, 1248, 1265).

Although plaintiff testified that he, his helper and a York Ice employee, all ran up the ladder when the gas allegedly leaked (ff. 201-203, 250), Trinka, who says he was the only one in the engine room, kept right on working there (ff. 1224, 1247, 1250, 1252).

It seems clear that an issue was definitely created as to whether any accident ever occurred and also as to the place where the occurrence, if any, took place. The jury was entitled to believe that plaintiff, Olaf Jorgensen, was not in the engine room at all while Trinka was testing; that Trinka was alone; that nothing of any importance happened because Trinka kept on working, and there were no major leaks (f. 1252).

A great deal of technical proof was also introduced on both sides relative to the properties of "freon" gas and as to whether it would break down into its constituent gases and cause injury under the circumstances existing at the time of the purported incident. Plaintiff's experts contended that "freon" would break down into chlorine and phosgene gas under the existing conditions; defendant's expert contended that it would not and could not do so (ff. 335, 473, 531-632, 935-962, 1466-1529).

Proceeding beyond the accident issue, the jury may well have found that plaintiff suffered no injury at all. He claimed to have injured his left shoulder in this accident. He denied any accidents prior to the one in suit which happened on October 2, 1941. Yet it was proven that he sustained injury to this same shoulder on August 11, 1941, less than two months before (ff. 1718-1719). Jorgensen then admitted this prior shoulder injury, and tried to pass it off as a minor thing. But his attending physician unsuccessfully attempted to aspirate the bursa of this left shoulder with a needle and to inject novocaine to ease the pain (f. 1718).

Plaintiff also denied an accident in April of 1943. This, too, was proven by a hospital record and his compensation claim to the effect that he was overcome by gas while testing a refrigeration system for leaks (ff. 154-156).

Jorgensen claimed serious lung damage in the instant case. Yet all of hospital X-ray readings up to June, 1942, were negative (ff. 1145, 1150). The hospital records indicated that the condition could not have been caused by gas. His own physician, Dr. Truby, said that these X-rays merely showed changes due to chronic bronchitis (f. 1147), and he finally admitted that he didn't know if this accident or a later one caused it (f. 1150).

Jorgensen was not unfamiliar with the installation of pipes and equipment in connection with refrigeration. In fact, he had sweated the joints of the very pipes out of which the "freon" gas allegedly leaked (ff. 191, 192). He had observed other refrigerating systems tested before this incident (f. 170). He had worked upon one on this very ship and had seen it tested (f. 171). In his signed statement he asserted that he, too, was testing for leaks (f. 1715), although on the trial he stated that Trinka was doing the testing, and that he knew what Trinka was doing and he merely watched (f. 179). Both in his signed statements and on the trial, Jorgensen indicated that he was clearly aware of what would happen when "freon" gas came into contact with an open flame (ff. 183, 1715); it turned into chlorine gas. And Trinka's deposition revealed that he, too, had informed plaintiff of the nature and properties of "freon" (ff. 1700, 1702) and that Jorgensen told him that he knew about "freon", having handled it before (f. 1707).

ANSWERING POINTS

I

Trinka's interest or disinterest was for the jury's consideration and was not a matter of law.

Plaintiff's counsel contends that, as a matter of law, he was entitled to a charge that Trinka, defendant's chief lay witness, was an interested one in the same manner as the plaintiff. Defendant respectfully contends otherwise.

Defendant's witness and employee, Trinka, was never a party defendant to this lawsuit. Therefore, he was not and could not be an interested party as a matter of law. Since he was, however, an employee of the corporate defendant the jury was entitled to consider his testimony in the light of that relationship. They did so. Furthermore, since the accident was over three years old and Trinka had never been served as a defendant, the Statute of Limitations had run on any cause of action against him. This presents an additional reason why he could not possibly have been a witness financially interested in the outcome of this suit.

Finally, as the learned Circuit Court pointed out, it was in no sense the judge's duty to say how far the jury should credit or discredit Trinka. He was free to comment or refrain from comment on this issue as on any other portion of the evidence. And the exercise of his judicial discretion in withholding such comment furnishes no basis for a valid objection.

II

Defendant's counsel committed no prejudicial error during summation.

Much ado is made about the fact that, during the course of summation, defendant's counsel stated that plaintiff would have a claim against other parties and not the de-

fendant (f. 1583). Objection was made and sustained by the Court and the jury told to disregard it. Plaintiff now claims that defendant's counsel meant to refer to workmen's compensation and, therefore, plaintiff was prejudiced. The argument is specious.

First, defendant's counsel never expressly mentioned the word "compensation". Secondly, plaintiff's counsel himself asked plaintiff (f. 1034):

> "Q. Now, this last question: Were you ever in any other hospital? Did the United States Compensation Commission at Washington Street, New York, refer you to a place for an X-ray? A. Yes.
> Q. And you went? A. Yes."

No objection was made by defendant's counsel to this line of questioning. Any intelligent jury would clearly infer compensation from plaintiff's counsel's own interrogation. And he himself had opened the door by referring to compensation.

On recross-examination also, it was brought out, without objection, that plaintiff was claiming compensation for this incident (f. 1039).

Thirdly, the Court admonished the jury to disregard defendant's counsel's statement and we cannot assume that they disregarded the warning. Again no exception was taken by plaintiff's counsel and he in no way indicated that he was dissatisfied with the Court's admonition to the jury which he, in fact, had asked for.

Respondent has no quarrel with the New York cases cited by petitioner. However they can have no application here. In each and every one of the cited cases, defendant's counsel was the one who attempted to introduce evidence of compensation. Whereas in the case at bar, plaintiff's own trial counsel opened up the subject.

Plaintiff's counsel's effort to assert prejudice because of an inference that plaintiff took compensation is both lame and belated. He expressly adverted to it in questioning his own client. And the error, if it was error, was therefore harmless and cured by the Court's ruling.

III

The jury was not coerced, no undue influence was exerted upon them, and their verdict was a proper one.

Plaintiff's counsel has submitted affidavits of jurors in an attempt to impeach their verdict. To put it quite mildly, this attempt to impeach the verdict is outrageous.

The law is clear, and it takes no citation to show, that a jury's deliberations and verdict are sacred and cannot be impeached. True, there can be no interference with their deliberations and no tampering therewith.

But what plaintiff's attorney seems to say here, oddly enough, is that the jurors coerced themselves. He does not and cannot contend that outside influence by way of fraud or duress was exerted upon them.

Defendant respectfully submits that the affidavits presented are incompetent to show any undue influence or duress to have been exerted upon this jury. Their deliberations are secret and in accord with their consciences and good judgment. We cannot presume that their deliberations were anything other than proper.

The law is definite and certain that affidavits and evidence of jurors are not admissible to impeach their verdict.

> *Payne* v. *Bruese*, 260 N. Y. S. 270, 236 A. D. 527; motion denied 262 N. Y. 630.
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> *Davis* v. *Lorenzo, Inc.*, 161 N. Y. S. 2d 624, 241 A. D. 782.
>
> *McHugh* v. *Jones*, 258 A. D. 111, aff'd 29 N. Y. S. 2d 76.

A fortiori, an affidavit made by another as to a juror's statement, is doubly inadmissible, being subject to the further objection that it is hearsay.

> *Gans* v. *Metropolitan St. Ry. Co.*, 84 N. Y. S. 918.
> *Broadway Bldg. Co.* v. *Saladino*, 8 Misc. 73.

Bennett v. *Mazzaro,* 144 Misc. 450, aff'd 237 A. D. 866.

Gambon v. *City of New York,* 153 Misc. 401.

Even if we do consider these affidavits, however, they show nothing more than that the minority of the jurors eventually agreed to abide by the majority vote in favor of defendant. Such an agreement has been held not to warrant the setting aside of the verdict.

Fabris v. *General Food Corporation,* 152 Fed. (2) 660 (C. C. A. 2).

Both the trial judge and the Circuit Court of Appeals had ample opportunity to consider this same application below. They did so and exercised their sound discretion in denying the motion to set the verdict aside. It is respectfully submitted that the verdict and judgment entered thereon in the District Court and the affirmance thereof by the Circuit Court of Appeals for the Second Circuit are correct and that the petition for certiorari be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Desmond T. Barry,
Counsel for Respondent.